

FILED

SEP 28 1988

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

WILLARD D. ALLISON, LINDA)
ALLISON, WILLARD J. ALLISON)
and BRIAN LEE ALLISON,)
Minors, by WILLARD D.)
ALLISON, their father and)
Next Friend,)

Plaintiffs-Appellees,)

vs.)

KALTENBACH, INC., A Michigan)
Corporation, HANS KALTENBACH)
MACHINENEFABRIK KG, A West)
German Corporation, and H.J.)
WEBER & COMPANY, an Illinois)
Corporation,)

Defendants-Appellants.)

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8-200

87-735

Appeal from the Iowa District Court for Wapello County
(CL2198-0684), Daniel F. Morrison, Judge.

Defendants Kaltenbach, Inc., Hans Kaltenbach
Machinenfabrik KG, and H.J. Weber & Company, appeal the
judgment rendered in favor of plaintiffs and against defen-
dants in a bench trial. **AFFIRMED.**

Steven L. Udelhofen of Jones, Hoffmann & Huber, Des
Moines, for defendants-appellants.

John A. Templer and Dean C. Mohr of Shearer, Hintze &
Templer, West Des Moines, for plaintiffs-appellees.

Considered by Oxberger, C.J., and Schlegel and Sackett,
JJ.

SCHLEGEL, J.**24**

Defendants, Kaltenbach, Inc., Hans Kaltenbach Maschinenfabrik KG, and H.J. Weber & Company, appeal the trial court's judgment against them and in favor of the plaintiffs for damages suffered as a result of injuries suffered by Willard D. Allison in an industrial accident. Defendants claim that the evidence at trial was insufficient to support the judgment, and that the trial court was in error in certain evidentiary rulings. Defendants also contend that the judgment should have been reduced by the amount of a subrogation claim which was canceled in exchange for the dismissal of this action against certain fellow employees. Additionally, defendants claim that the award of prejudgment interest is improper. We affirm the judgment.

Defendants claim error in that plaintiff's expert was allowed (1) to express legal opinions and opinions outside his area of expertise; (2) to express opinions regarding available modifications that were shown by other evidence to be unacceptable; and (3) to offer opinions regarding warnings and the legal sufficiency of warnings. Defendants further claim the court was in error in allowing the introduction of and testimony from certain manufacturing standards, called "ANSI" standards, and in allowing recitation from and referral to various books by plaintiffs' counsel.

Iowa Rule of Evidence 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Further, as the Iowa Supreme Court stated in Smith v. Cedar Rapids Country Club, 255 Iowa 1199, 1210-11, 124 N.W.2d 557, 559 (1963):

Courts and other authorities uniformly agree that the receipt of opinion evidence, whether lay or expert, and the extent to which it will be received in any particular case, are matters resting largely in the administrative discretion of the court (citations omitted). Appellate courts should be and are very reluctant to interfere with such discretion unless it has been manifestly abused to the prejudice of the complaining party. Then too, it is not the province of the court in such a case to pass upon the credibility of the several witnesses and say one's opinion is more likely to be correct than another. The jury is to determine the weight to be given this evidence (citations omitted).

Accordingly, the determination of whether to allow Dr. Blundell's testimony was in the discretion of the trial court, and the weight to be given to that testimony was the province of the trier of fact, the court in this case. The fact that there was a dispute between plaintiffs' expert and defendants' witnesses does not render the opinions expressed by plaintiffs' witness inadmissible. It is for the trier of fact to determine the weight and credibility to be given that testimony. See, Ganrud v. Smith, 206 N.W.2d 311, 316 (Iowa 1973) (quoting Smith, 255 Iowa at 1210-11, 124 N.W.2d at 559).

Dr. Blundell was qualified by training and experience to render opinions as to the design and safety of the instrumentality involved in this case. The trial court did not abuse its discretion in permitting him to express those opinions. There was no error with respect to his testimony. Allowance of his reference to the "ANSI" standards was not error, and in fact the reliance upon those standards was confirmed, in part, by defendants' expert witness. The relevance of those standards was shown in this case, as well as Dr. Blundell's familiarity with them. The standards meet the foundational requirements set forth by the supreme court in Aller v. Rodgers Machinery Mfg. Co., 268 N.W.2d 830, 840-41 (Iowa 1978), and the admission of those standards, as well as testimony concerning them, was proper.

Defendants' complaint that plaintiffs' witness was permitted to refer to certain books and writings upon which he relied is without merit. Dr. Blundell's references to those writings was to demonstrate some of the sources of his knowledge utilized to form his opinions. See Iowa R. of Evid. 703 (1987). Defendants failed to make proper objection to the introduction of any excerpts from those sources. We cannot tell, from the record, what defendants' claim is based upon. Other than a generalized objection to the whole subject of reference books, which was made once, but not renewed while the testimony of Dr. Blundell

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proceeded,—the record provides nothing upon which we can rule. Any objection by defendants is waived. See State v. Horton, 231 N.W.2d 36, 38 (Iowa 1975).

Defendants complain of several errors in the matter of damages. First, they claim the court was in error in allowing evidence of bills from two doctors who consulted with Allison. The court found that those bills should be admitted. The testimony of both of the doctors related to evaluations of medical conditions, and were apparently helpful to plaintiff in understanding his medical condition. In the case of Dr. Sullivan, the psychologist, there was a need to determine if Allison was able to return to working on the saw that led to his injury. It was found that he suffered a phobia and work disorder which resulted in Allison being assigned to different work. Allison sought a second opinion from Dr. Pakiam, which resulted in a recommendation that further surgery be performed. Allison's surgeon, Dr. Wormhoudt, agreed, and further surgery was performed as a result of that consultation. The court found that the examinations by Drs. Sullivan and Pakiam were necessary because of the injury. There was sufficient evidence to support that finding. We find that the admission of those bills was not error.

Defendants object to the assessment of damages, for various reasons. The trial court found that the plaintiffs had suffered damages as a result of Allison's injury.

There is substantial evidence in the record to support a finding that as a result of the occurrence, Allison lost parts of three fingers on his left hand. There was evidence that the injury was and is painful. Evidence was substantial that Allison had suffered a loss of earnings as a result of the injury. The loss of parts of his fingers caused him difficulty in doing ordinary things in life. Testimony indicated that he would likely suffer a loss of earnings in the future.

There was evidence that Allison's wife and children had suffered a loss of the companionship in activities in which Allison had participated prior to the injury.

There was substantial evidence in the record to support the court's findings of damages. Accordingly, we are bound by those findings. We affirm the damages awarded.

Defendants urge us to find that plaintiff was not entitled to recover damages from defendants as a matter of law. It is urged that the evidence shows that plaintiff was guilty of misuse of the piece of machinery involved herein. Such misuse, if established as a matter of law, would bar plaintiff's recovery. Hughes v. Magic Chef Inc., 288 N.W.2d 542, 546 (Iowa 1980). Under that case, it was decided that misuse of a product is no longer to be considered an affirmative defense in products liability actions, but to be "treated in connection with the plaintiff's burden of proving an unreasonably dangerous condi-

tion and legal cause." Id. The court there stated: "[T]he burden is on the plaintiff to prove that the legal cause of the injury was a product defect which rendered the product unreasonably dangerous in a reasonably foreseeable use." Id.

In this case there was evidence that the product contained defects which rendered it unreasonably dangerous. There was evidence that the product was often operated in such a manner that finished pieces were left upon the work table, and that there was risk involved in that practice. There was evidence that defendants should have foreseen that such a practice would occur, and that they should have guarded against it. Although there was no direct evidence that plaintiff was intentionally operating the machine in a dangerous manner, opinions were offered and admitted that he had left a finished piece on the table when activating the saw to work on another piece and that his effort to remove the piece resulted in his fingers being caught and severed. There was sufficient evidence to support the finding of the court that the legal cause of the injury was a product defect which rendered the product unreasonably dangerous in a reasonably foreseeable use. In view of this holding, plaintiff was not barred, as a matter of law, from recovering damages on account of his injury.

Defendant claims that the amount of a subrogation settlement agreed upon between plaintiff and his employer

should have been deducted from the amount of damages awarded by the court. As to the amount involved in any settlement, the record is incomplete. Defendants did not make an adequate record on this issue to allow us to pass on its merits. Additionally, defendants cite no authority in support of this proposition. As stated in Arthur Elevator Co. v. Grove, 236 N.W.2d 383, 393 (Iowa 1975): "[W]e are under no compulsion to review any assignment of error when the complaining party cites no authority in support of his argument." In quoting Arthur Elevator, the supreme court, in Miller v. Int'l. Harvester, 246 N.W.2d 298, 304 (Iowa 1976), stated: "Phrased otherwise, in the absence of relevant supportive authority an argument by a complaining party may be deemed waived." In view of the record in this case, we decline to review the consideration of the subrogation claim in the reduction of the award.

Defendants also argue that prejudgment interest is unconstitutional in this case. Once again, no applicable authority is cited for this proposition. The claim is made that plaintiff in this case was not required to use any of his own money, and was whole at all times, since he received workers compensation. While this is a novel argument, we find no authority that supports defendants' theory that such a situation renders prejudgment interest unconstitutional.

Finally, defendants argue that the evidence as a whole failed to support the findings of fact made by the court and the findings of fact include misstatements of the record and even misstatements as to the witnesses called. Defendants state: "The court in this case wrote a decision contrary to all of the evidence presented to it. The only explanation for such a decision is complete inattentiveness of the Court to the record." Counsel's zeal for the advocacy of its clients cause has likely been the cause of the interpretations of the record that are contended to be misstatements by the trial court. Suffice it to say that upon a complete examination of the transcript of testimony received in the trial, we find substantial evidence to support the findings of the trial court.

Upon the whole record, we affirm the trial court.

AFFIRMED.